

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6215

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PIERCE & STEVENS CHEMICAL CORP.,

Plaintiff-Appellee,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

WILLIAM L. RIETH
PHILLIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER
Attorneys for Plaintiff-Appellee
3400 Marine Midland Center
Buffalo, New York 14203
Phone: (716) 847-8400

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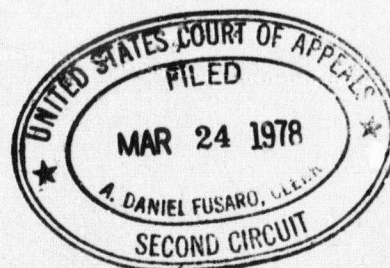


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BRIEF FOR THE APPELLEE

Questions Presented

1. Did the District Court properly enjoin the Commission's proposed disclosure of uncontrovertedly erroneous and misleading information about plaintiff's products when disclosure would result in irreparable harm to plaintiff, when plaintiff demonstrated the probability of success on the merits, and when the balance of hardships and equities tipped decidedly in plaintiff's favor?

2. Do the Commission's obligations mandated by the Consumer Product Safety Act for elemental fairness in the public disclosure of information apply to the public disclosure of information under the Freedom of Information Act or only to "affirmative releases" by the Commission?^{1/}

^{1/} The following abbreviated terms are sometimes used herein:

"the Commission"	- the Consumer Product Safety Commission.
"CPSA"	- the Consumer Product Safety Act, 15 U.S.C. § 2051 <u>et seq.</u>
"FOIA"	- the Freedom of Information Act, 5 U.S.C. § 552
"P&S"	- the plaintiff, Pierce & Stevens Chemical Corp.
"DB"	- Defendant's Brief
"Hearings"	- Hearings of the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce 92nd Cong.,
	1st and 2d Sess. (1971-72)
"Oversight Hearings"	- Hearings of the Subcommittee on Oversight and Investigation of the House Interstate and Foreign Commerce Committee, 94th Cong., 2d Sess. vol. IV (1976)

Statement of Facts

In its letter dated April 22, 1975 addressed to plaintiff P&S, the Commission stated it had "received a Freedom of Information Act request for a copy of a plant inspection report of your firm prepared by Commission staff."^{2/} While the Commission did receive a letter from Ms. Larson dated April 3, 1975 (App. 54), she merely asked some questions about one P&S product, Hy Bond Reducer. Those questions were all answered by the Commission's letter of April 23, 1975 (App. 55).^{3/} In August 1975, Ms. Larson brought suit against P&S (App. 61).

P&S made prompt objection to the proposed public disclosure of the three FDA documents (App. 9-30). P&S's objections noted: (1) the Commission's duties, under Section 6(b)(1) of CPSA, to take reasonable steps to assure, prior to disclosure, that the information was accurate, that disclosure was fair and

^{2/} The Commission's letter in fact enclosed three documents which it proposed to disclose. Those documents were prepared by employees of the Food and Drug Administration ("FDA") in 1969 and 1970.

^{3/} P&S asserts that the Commission did not receive a FOIA request and that the Commission was simply attempting to intermeddle in Ms. Larson's lawsuit against P&S. The Commission claims the letter of April 3, 1975 constitutes such a request although that letter refers to no document and asks for none. The District Court in enjoining disclosure did not find it necessary to decide that issue, although it noted there were "sufficiently serious questions going to the merits."

would promote the purposes of CPSA; (2) the Commission's apparent failure to consider the applicability of FOIA Exemptions 3, 4 and 5 (5 U.S.C. § 552(b)(3), (4) and (5)); and (3) the erroneous, misleading and potentially harmful nature of the information contained in the three documents. Many of the erroneous and misleading statements in the documents related to more than 30 P&S products about which Ms. Larson made no inquiry whatever.

Except for deleting certain confidential information on the basis of FOIA Exemption 4, the Commission cryptically rejected all of P&S's objections (App. 31-32). Following a further unsuccessful protest to the Commission's Chairman (App. 33-37), this action was commenced October 2, 1975, seeking a preliminary injunction and other relief because the proposed disclosure would involve likely imminent violations of provisions of CPSA and FOIA.

The District Court granted a preliminary injunction after finding that the element of irreparable harm was established from the defamation of P&S's good name and products that would result from the proposed disclosure of inaccurate reports (App. 68-69). The Court concluded that P&S showed the probability of success on the merits, finding that the criteria imposed by Section 6(b)(1) are applicable to FOIA requests (App. 72-73). The District Court furthermore found that there were serious other questions going to the merits and that a balancing of the

relative equities and hardships tipped the scales decidedly in P&S's favor (App. 73-74). The Commission's appeal contends that the protective criteria of Section 6(b)(1) should not apply to public disclosure pursuant to FOIA requests but should only apply to so-called "affirmative releases" of information.

-- ARGUMENT --

- I. PUBLIC DISCLOSURE OF INFORMATION WAS PROPERLY ENJOINED WHERE THE INFORMATION WAS UNCONTROVERTEDLY ERRONEOUS AND MISLEADING, DISCLOSURE WOULD RESULT IN IRREPARABLE HARM TO PLAINTIFF, PLAINTIFF DEMONSTRATED THE PROBABILITY OF SUCCESS ON THE MERITS AND THE BALANCE OF HARDSHIPS AND EQUITIES TIPPED DECIDEDLY IN PLAINTIFF'S FAVOR.

The District Court weighed plaintiff's asserted rights to a preliminary injunction against the appropriate legal standards. Those standards require a plaintiff to make "a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." State of New York v. Nuclear Regulatory Commission, 550 F.2d 745, 750 (2d Cir. 1977). Examination of the record and the pertinent law reveals the sound fundament for the preliminary injunction here.

1. Significant Parts of the Information Proposed to be Disclosed Were Inaccurate and Misleading. The Commission does not seriously dispute that misleading inaccuracies exist in the

information which it prepares to release (App. 68, fn. 3). These inaccuracies in the documents were pointed out to the Commission in plaintiff's letter to the Commission (App. 9-30) which noted many misleading, erroneous and speculative comments respecting P&S's products. The Commission's comment about such errors was merely that it regarded "some" of the inaccuracies as "minor" and "some" information as not readily verifiable (App. 48, ¶ 5).^{4/}

2. Disclosure of the Erroneous and Misleading Information Would Irreparably Harm P&S. The Commission also does not seriously dispute the possibility of irreparable harm that would result to the good name of P&S and its products from the disclosure of these inaccurate reports. The District Court found "the likely denigrating effects and economic repercussions to P&S in the market places from such inaccurate disclosure and the damage to P&S's competitive position would be irreparable." (App. 69).

The Commission recognized that it cannot restrict the use made of information it may release, 41 F.R. 16574 (April 20, 1976). Once the false information is released, it thus may be spread into every market and there will be no way to unscramble

^{4/} The Commission did not attempt to verify information with P&S, nor apparently with FDA, although they were presumably the most knowledgeable sources available. Nor did the Commission delete claimed inaccuracies respecting the more than thirty products about which there had been not even been any inquiry.

the unsavory mess. The Commission also recognizes that its "premature release of information . . . could prejudice the rights of a potential defendant to a fair trial since the information and evidence relating to the suspected violation may not be substantiated" 43 F.R. 5803, 5804 (February 10, 1978).

3. P&S demonstrated the probability of its success on the merits. Several issues going to the merits were presented to the District Court. It found that "there are sufficiently serious questions going to the merits to make them fair ground for litigation" (App. 73). Those issues included:

(i) whether the Commission received any FOIA request respecting any P&S product;

(ii) assuming a FOIA request was made, whether it was not limited to one product only;

(iii) assuming a FOIA request was made, whether disclosure was not prohibited by FOIA Exemption 3 (5 U.S.C. 552(b)(3)), by § 6(b)(1) of CPSA, and by fundamental due process principles;

(iv) assuming a FOIA request was made, whether the Commission deleted all confidential and trade secret information barred from disclosure by FOIA Exemption 4 (5 U.S.C. 552(b)(4)) and by CPSA Section 6(a)(2); and

(v) assuming a FOIA request was made, whether disclosure would not be improper under FOIA Exemption 5 (5 U.S.C. 552(b)(5)). Because the District Court concluded that the protections of Section 6(b)(1) CPSA were applicable to FOIA requests, it became

unnecessary to address all the other "serious questions" before it. The Court did, however, indicate its view that the documents were not barred from disclosure by FOIA Exemption 5.

Any plain reading of FOIA and Section 6(b)(1) CPSA shows they are each concerned with the disclosure of information to the public. The District Court found there was no sound basis for the Commission's imaginative bifurcation of public disclosure under Section 6(b)(1) into two types: (i) so-called "affirmative releases" to which the Commission would apply Section 6(b)(1) protections, and (ii) so-called "passive releases" to which the Commission would not apply Section 6(b)(1) protections.

As more fully set forth in Point II infra, the protections mandated by Section 6(b)(1) do apply to all public disclosures of information by the Commission, whether under FOIA or otherwise. The Commission's failure to grant those protections to P&S was a clear abdication of its statutory duty.

4. A balancing of the relative hardships and equities tipped the scales decidedly in P&S's favor. No great public interest requires the release of these documents. Extremely flammable contact adhesives (such as the consumer product about which the "requestor" sought information) are now barred in interstate commerce under Commission Regulation § 1302.4, 42 F.R. 63730 et seq. (December 19, 1977). Any relevant information in the documents is discoverable by the "requestor," subject to appropriate protective orders, in the legal proceedings she has

instituted against P&S. The possible grave injury to P&S from the release of the erroneous and misleading information plainly preponderates over any supposed reason to release the information.

Where the documents contain unquestioned error and release thereof may result in incalculable loss to P&S's business and goodwill, and where serious legal questions exist respecting the propriety of such release, the District Court acted properly in issuing the preliminary injunction here. The principle that findings of the District Court will not be upset unless clearly erroneous mandates affirmance of the District Court's action.

II. THE BASIC PROTECTIONS IMPOSED ON THE COMMISSION BY SECTION 6(b)(1) APPLY TO PUBLIC INFORMATION REQUESTS UNDER FOIA.

1. Section 6 CPSA Contemplates its Application to Public Disclosure Under FOIA. Section 6 CPSA attempts to integrate CPSA with FOIA.^{5/} Indeed, CPSA Section 6(a)(1) specifically refers to FOIA as one means of public disclosure. That subsection makes clear that nothing in CPSA requires that any information be disclosed if it is either described by FOIA subsection (b) or "is otherwise protected by law from disclosure to the public." CPSA Section 6(a)(2) generally prohibits the disclosure of confidential and trade secret matters by the Commission.

^{5/} Pertinent provisions of CPSA and FOIA are set forth in Appendix A hereto.

Section 6(b)(1) CPSA similarly applies to the public disclosure of information, whether under FOIA or otherwise. It imposes specific duties on the Commission whenever the information to be disclosed "will permit the public to ascertain readily the identity" of the product manufacturer. In such circumstances the Commission, prior to the public disclosure of information, is required to notify the manufacturer and to afford the manufacturer a reasonable opportunity to comment on the information. In addition, the Commission is required to "take reasonable steps to assure," prior to public disclosure, that the information is accurate, that the disclosure is fair and is reasonably related to effectuating the purposes of CPSA.

The "public disclosure" language of Sections 6(a)(1) and 6(b)(1) CPSA envisages both the disclosure of public information under FOIA as well as other public disclosures by the Commission. The reference to FOIA in CPSA Section 6(a)(1) and the "public disclosure" language in both Sections 6(a)(1) and 6(b)(1) recognize the obvious fact that FOIA deals with making "public information" available. Under its section heading "Public Information," FOIA subsection (a) provides three different means for making information "available to the public." 5 U.S.C. 552(a). Certain public information is to be set forth in the Federal Register, other information is required to be available for "public inspection and copying," and still other records are to be made available to the public when a "request for records" is made which "reasonably describes such records" 5 U.S.C. 552(a)(1),

(2) and (3). FOIA subsection (b) then lists nine classes of information to which such public disclosure is inapplicable.

The plain language of CPUSA and FOIA reveal parallel concerns with the public disclosure of information. There is, in light of that plain interrelation, no basis for the Commission's interpretation that CPUSA's protections are inapplicable to public disclosure under FOIA requests.

2. The Commission's "Interpretation" of Section 6(b)(1) is Not Valid. After P&S's letter of May 5, 1976 charging the Commission with neglect of its duties under Section 6(b)(1) and after commencement of this action on October 2, 1976, the Commission issued an interpretative decision that Section 6(b)(1) was applicable to FOIA requests (App. 50). The Commission's decision apparently recognized the tenuousness of its imaginative interpretation. For that decision also provided that: "As a matter of policy, however, the Commission may attempt to provide Section 6(b)(1) protections with regard to certain disclosure of information generated by Freedom of Information Act requests." (Emphasis added.) It is not clear as to what type of "certain disclosures" or under what circumstances the Commission "may attempt" to provide such Section 6(b)(1) protections.

The Commission has no special expertise to interpret what constitutes "public disclosure" under Section 6(b)(1). While an agency interpretation of its own regulations is certainly entitled to weight (Perine v. Wm. Norton & Company, Inc., 509 F.2d 114, 120 (2d Cir. 1974)), an administrative

interpretation of a statute is not valid unless it has "warrant in the record" and a reasonable basis in law." Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 153, 154 (1946). There is no such warrant here and no reasonable basis in law exists for the Commission interpretation. The simple ipse dixit of the Commission is not enough.

3. The Commission's Interpretation is Contrary to the Legislative History of CPSA. The Commission seeks to justify its tortured interpretation of Section 6(b)(1) by repeated citations to the legislative history of CPSA and of the 1976 amendment to Section 29 CPSA, 15 U.S.C. § 2078 (DB pp. 10-20). In fact, the legislative histories cited by the Commission manifest a clear purpose that Section 6(b)(1)'s protections of accuracy, truthfulness and fairness be applicable in any public disclosure.

The legislative history relating to the passage of CPSA in 1972 does not support the Commission's interpretation. Congressman Crane is one of only two Congressmen whose comments are referred to by the Commission in connection with the adoption of CPSA in 1972. (DB pp. 11, 12, fn. 6). And he opposed the passage of CPSA. While Congressman Crane decried the unfortunate and unfair disclosures by Federal agencies, he cited the FTC's disclosure about Zerex as merely one of the "many other examples of the increasing harassment of private business and industry by government." 188 Cong. Rec. 31389 (1972). While Congressman Moss made a general statement that he would not want the

availability of information tied to FOIA guidelines, he did not articulate what guidelines he might have wished incorporated into CPSA. His expressed interest in guidelines that would "afford adequate protection" make it unlikely he would countenance disclosure where it was unfair and involved inaccurate and misleading information (Hearings, p. 910).

The hearings on H.R. 8110, et al., before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce demonstrate that both the Administration and industry sought fairness and truth as the touchstones for disclosures by CPSA. A long stream of witnesses voiced those concerns.

Secretary Elliot H. Richardson of H.E.W. observed the interrelation of the proposed CPSA with FOIA, stating that the provisions which later became § 6(b) of CPSA, would protect the Commission's "refusal to disclose information not required to be released by the public information" provisions of FOIA (Hearings, p. 188). Secretary Richardson later urged fair play in disclosure by the Commission. Noting that the cooperation of manufacturers is indispensable to the Act's operation, he said that "Manufacturers must have assurance that their cooperation [in furnishing information to the agency] will not place them at a competitive disadvantage" (Hearings, pp. 969, 970).

The National Committee on Product Safety observed that the "obligation of fairness [in disclosure] is weighty"

(Hearings, p. 446). A General Electric representative also discussed that heavy responsibility:

"If the information is premature, inaccurate or misleading, the consumers themselves will suffer. If it is identified with a company or a product, it can have serious impact upon reputation, good will and market place results. Accordingly, we urge that the power to disseminate information carry with it the responsibility to be sure of its accuracy and that truth in disclosure be the governing statutory principle. . . . In the safety area, however, the principle is even more significant and basic fairness requires no less. For these reasons, we strongly support the procedures and the truth in disclosure principle of Section 4(c) of H.R. 8110 and regret that H.R. 8157 has no comparable provision. (Hearings, pp. 1065-1066)

Representatives of various industries all warned against the release of inaccurate information:

Public release of inaccurate injury data can only serve to destroy public confidence within the products involved and in the administration releasing such data. . . (Hearings, p. 1130)

"No information should be disclosed which is inaccurate, misleading or incomplete" (Hearings, p. 1196).

"Inadequate and incomplete information can only result in poor protection for the consumer." (Hearings, p. 1210)

Industry spokesmen also voiced concerns about possible competitive injuries from improper public disclosure:

"Authority to collect and disseminate information carries with it a responsibility not to disclose data that may injure a company or reveal confidential information" (Hearings, p. 1237).

A trade association expressed anticipation of a greater willingness of manufacturers to cooperate in furnishing information to

the Commission if doing so will not place them at a competitive disadvantage (Hearings, p. 1268).

The U.S. Chamber of Commerce presentation urged that non-confidential material be made publicly available in "a fair and equitable manner" and that "Moreover, the data released to consumers should not be inaccurate, misleading or incomplete" (Hearings, p. 1318).

In sum, the Hearings in connection with CPSA's enactment evidence pervasive concerns to have basic principles of truth and fair play apply in disclosure and to avoid competitive injury from the premature release of inaccurate or misleading information. Those intentions were underscored in the Conference Report 92-1593 reprinted in 1972, U.S. Code Cong. & Ad. News p. 4633 where the interrelation between CPSA and FOIA was noted in immediate juxtaposition to comments respecting the Commission's responsibilities for accuracy and fairness:

The Commission was directed to take steps to assure that publicly disclosed information from which specific manufacturers or distributors could be identified was accurate and that the disclosure was fair in the circumstances and reasonably related to carrying out its duties. No information would be required to be publicly disclosed if it is information described in section 552(b), title 5, United States Code (relating to information which is entitled to be protected from public access under the Freedom of Information Act), or which is otherwise protected by law from disclosure to the public.

The legislative history of the 1976 amendment to CPSA adds no support for the Commission's tortured interpretation. In the Oversight Hearings on January 30, 1976 the Commission Chairman

urged a Congressional "modification or clarification of Section 6(b)" and presented a proposed amendment of Section 6(b) for its consideration (Oversight Hearings p. 8). The modifying amendment did not pass. Now the Commission in effect urges this Court to adopt that amendment and cites the singularly equivocal statement of one Congressman that he is "inclined to agree" with unspecified statements of the Commission Chairman. Section 6(b) was not amended.

The amendment in 1976 to another CPSA Section (CPSA Section 29, 15 U.S.C. 2078) did not in any way affect Section 6(b)(1) and did not diminish the public disclosure protections it affords. If anything, that amendment reaffirmed the applicability of such protections to any disclosure to the public. Section 29 relates to the Commissions disclosure of information to other governmental agencies and it requires that no such agency may make public disclosure of any of such information unless the Commission has complied with the protective provisions of Section 6(b)(1).

The Conference Report accompanying S. 644, HR Rep. 1022, 94th Cong. 2d Sess. 22 (1976) reprinted in 1976, U.S. Code Cong & Ad. News 1029 made clear the continuing requirement on the Commission to comply with Section 6(b) before any agency made public disclosure of information obtained from the Commission. The Report does not, as the Commission would suggest, render Section 6(b) inapplicable whenever there is a FOIA request. The Report commented that the protective requirements of Section

6(b)(1) did not conflict with the provisions of FOIA. Indeed, there is no conflict. The provisions of FOIA Exemption 3 refer to many statutes, including Section 6(b)(1) CPSA, which establish criteria for withholding or refer to types of matter to be withheld. In any case the Conference Report in 1976 affords an hazardous and unreliable basis for ascertaining any Congressional intent in passing CPSA in 1972, United States v. Price 361 U.S. 304, 313 (1960) quoted in United States v. Philadelphia National Bank 374 U.S. 321, 248-49 (1963). That hazard becomes astronomic when one seeks to find, contrary to the plain and unamended language of Section 6(b)(1), a supposed intent that the Commission freely disclose inaccurate and misleading information despite apparent unfairness and resulting injury.

4. The protections of Section 6(b)(1) against unfair disclosure are embraced by FOIA Exemption 3. As the District Courts found here (App. 70-72) and in the GTE Sylvania v. Consumer Product Safety Commission (D.Del 1977) (App. 89-93), the protections of Section 6(b)(1) are made applicable to FOIA requests by virtue of FOIA Exemption 3. To similar effect is the conclusion reached in Note, The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act 76 Colum. l. Rev. 1029, 1045 n. 100 (1976).

FOIA Exemption 3, as amended in 1976, exempts from public disclosure under FOIA matter which is "specifically exempted from disclosure by statute other than Section 552b of this title, provided such statute . . . , establishes particular

criteria for withholding or refers to particular types of matters to be withheld." Section 6(b)(1) articulates substantial criteria for withholding: prior to disclosure, the Commission must take reasonable steps to assure that the information is accurate, that disclosure is fair and is reasonably related to promoting the purposes of CPSA. Patently implicit in such statutory mandate is the negative statement of the same mandate, i.e., the Commission shall not make such public disclosure until and unless it has taken those reasonable steps.

A statute, such as Section 6(b)(1), need not explicitly refer to "withholding" to be comprehended within FOIA Exemption 3. A statute can establish criteria for withholding without using the "withholding" terminology. In Seymour v. Barabba 559 F.2d 806, 807, 808 (D.C. Cir. 1977) the court held that a statute which restricted the use to be made of information was "a clear and strongly worded prohibition against disclosure which would qualify under Exemption 3" and that the Statute "refers to the particular type of matter to be withheld." Similarly are Kruh v. General Services Administration 421 F. Supp. 965, 967 (E.D.N.Y. 1976) and Founding Church of Scientology of Washington v. National Security Agency 434 F. Supp. 632-633 (D. D.C. 1977) where the two District Courts each held that a statute which provided "nothing shall be construed to require the disclosure" had expressly referred to "matter to be withheld."

Section 6(b)(1) was designed to provide appropriate criteria for withholding. As the legislative history shows,

Section 6(b)(1) was written into the bill in order to provide "detailed requirements and limitations relating to the Commission's authority to disclose information which it requires." Furthermore, "The Committee recognize[d] that the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate." H.R. Rep. No. 1153, 92nd Cong., 2d Sess. 31, 32 (1972). Thus, the inclusion of CPSA "within Exemption Three offers no threat to the fulfillment of the FOIA's purpose." Note, supra, 76 Colum L. Rev. at 1045 n. 100.

5. The Commission Interpretation Would Permit the Kind of Competitive Injury the Statutory Protections were Designed to Prevent. The purpose of imposing "limitations relating to the Commission's authority to disclose information" was plainly evident in the concerns voiced in the Hearings (supra pp. 11-15). The "reasonable steps" to be complied with by the Commission were required in order to obviate or minimize the possibility of financial ruin from the premature disclosure of inaccurate data. That sort of disaster from the release by the Commission of inaccurate and misleading information could result whether the Commission's disclosure was by an "affirmative release" or by a "passive release" under FOIA. The Commission asks this Court to believe that, despite Congress's concern to avoid such unfair results, Congress nonetheless wished to approve such an unfair result whenever it could be accomplished by a "passive release" under FOIA. The idea is barbaric.

Such a bizarre interpretation would permit the Commission to operate with virtually total freedom from Section 6(b)(1)'s restraints. A staff member of the Commission could easily pass along word to someone suggesting that a FOIA request be made for damaging, albeit inaccurate and misleading Commission documents and such documents rife with inaccuracies, unfair innuendo and unjust accusations could then be released and competitive ruin ensue. It is unthinkable that Congress wished such a facile and complete frustration of the basic protections of Section 6(b)(1). The affirmative obligations of the Commission for truthful and accurate disclosure cannot be so flippantly avoided. GTE Sylvania v. Consumer Product Safety Commission 404 F. Supp. 352, 370 (D.C. Del. 1975).

The Commission advances less-than-candid excuses for its refusal to comply with Section 6(b)(1)'s protections. None of those excuses justify its abdication from duty. First, the Commission suggests that the procedures of Section 6(b)(1) are "inconsistent" with FOIA, because, under FOIA, an agency does not rewrite documents (DB p.22). But FOIA provides for agency blue pencilling, stating that agency may disclose any reasonably segregable portion of a record. . . after deletion of the portions which are exempt." (5 U.S.C. 552(b)) In Rose v. Department of Air Force 495 F.2d 261, 268 (2d Cir. 1974) aff'd 425 U.S. 352 (1976) the agency was directed to cooperate with the District Court in redacting the documents. Even the partially expurgated versions

of the documents proposed here for release (App. 31-32) involved an editing of the documents by the Commission.

Secondly, the Commission shockingly urges that its release of the documents would connote "no apparent government approval" to the contents of those official government documents (DB p. 23). But documents issued under the name of an agency of the United States vouch for themselves.

Thirdly, the Commission points to the administrative burden that would be involved in shouldering its responsibility.^{6/} (DB p. 23, 24) But, as stated in Mobil Oil Co. v. FTC 406 F. Supp. 305, 312 (S.D.N.Y. 1976), "adherence to the FOIA's scheme requires that the job be done." Furthermore, the documents here presented no great burden. Once these documents were ascertained to be within FOIA Exemption 3 and to present substantial problems of accuracy and fairness, the Commission should with minimal effort, have determined against their release.

Lastly, the Commission urges that Section 6(b)(1)'s requirements "would make it impossible" for the Commission to comply with FOIA's ten day requirement (DB p. 24). But FOIA

^{6/} That Commission responsibility was acknowledged by its Chairman before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on April 14, 1975:

Certainly, we have both a moral and legal obligation to guard against the publication of "false", improper and unsubstantiated charges against a given company or industry. And we accept that responsibility and actively attempt to eliminate those situations.

merely requires that an agency make, within ten days, a determination "whether to comply with the request," not that it release the documents within ten days. (5 U.S.C. 552(a)(6)(A)(i)). Furthermore, FOIA provides for extending those time limits when, among other things, added time is required to "appropriately examine" the records or to consult with other agencies about the records. (5 U.S.C. 552(a)(6)(B)).

The mere ipse dixit of the Commission does not change the plain obligation unequivocally and unconditionally placed on the Commission by the statute. The statutory language and the legislative history together reflect an overriding purpose to avoid possible competitive injuries that may result from public disclosure without prior safeguards. The statutory protections should not be circumvented by the sophistry of the Commission.

CONCLUSION

The District Court's findings appear unchallenged and were not shown to be "clearly erroneous." Even if the Commission's unique interpretation were adopted, the preliminary injunction should nonetheless be affirmed because other serious legal issues going to the merits justify the injunction. The Commission's

interpretation preverts the requirements of the statute. The order of the District Court should be affirmed.

Respectfully submitted,

William L. Rieth
Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, New York 14203
Phone: (716) 847-8400

Dated: March 22, 1978

Bnp

APPENDIX A

1. Section 6 CPSA:

§ 2055. Public disclosure of information

(a)(1) Nothing contained in this chapter shall be deemed to require the release of any information described by subsection (b) of section 552 of Title 5 or which is otherwise protected by law from disclosure to the public.

(2) All information reported to or otherwise obtained by the Commission or its representative under this chapter which information contains or relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed, except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceeding under this chapter. Nothing in this chapter shall authorize the withholding of information by the Commission or any officer or employee under its control from the duly authorized committees of the Congress.

(b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this chapter, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter. If the Commission finds that, in the administration of this chapter, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

(2) Paragraph (1) (except for the last sentence thereof) shall not apply to the public disclosure of (A) information about any consumer product with respect to which product the Commission has filed an action under section 2061 of this title (relating to imminently hazardous products), or which the Commission has reasonable cause to believe is in violation of section 2068 of this title (relating to prohibited acts), or (B) information in the course of or concerning any administrative or judicial proceeding under this chapter.

(c) The Commission shall communicate to each manufacturer of a consumer product, insofar as may be practicable, information as to any significant risk of injury associated with such product.

2. Section 29 CPSA:

§ 2078. Cooperation with States and other Federal agencies

* * * * *

(e) The Commission may provide to another Federal agency or a State or local agency or authority engaged in activities relating to health, safety, or consumer protection, copies of any accident or investigation report made under this chapter by any officer, employee, or agent of the Commission only if (1) information which under section 2055(a)(2) of this title is to be considered confidential is not included in any copy of such report which is provided under this subsection; and (2) each Federal agency and State and local agency and authority which is to receive under this subsection a copy of such report provides assurances satisfactory to the Commission that the identity of any injured person and any person who treated an injured person will not, without the consent of the person identified, be included in—

- (A) any copy of any such report, or
- (B) any information contained in any such report,

which the agency or authority makes available to any member of the public. No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section 2055(b) of this title.

3. FOIA:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

* * * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

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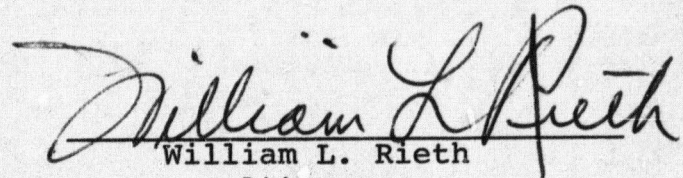
CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 1978, I served the foregoing Brief for the Appellee upon counsel for appellant and upon counsel for amicus by causing copies to be mailed, postage prepaid, to:

Mark N. Mutterperl, Esq.
Appellate Section
Civil Division, Room 3643
U. S. Department of Justice
Washington, D. C. 20530

an

Victor H. Kramer, Esq.
600 New Jersey Avenue, N.W.
Washington, D. C. 20001


William L. Rieth
Attorney